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NO. 84-1766

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CARLTON SMITH
Petitioner

vs.

MORRIS THIGPEN, ET AL.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. Should Certiorari be granted where the Petitioner's right to effective assistance of counsel was caused by his own lack of diligence.

B. Should Certiorari be granted for this Court to review evidence presented in a state court trial, to determine if the jury could reasonably have concluded that Petitoner was guilty of the crime charged beyond a reasonable doubt.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Respondents respectfully pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied in this case.

OPINION BELOW

The Mississippi Supreme Court affirmed the conviction of petitioner without written opinion. Smith v. State, 393 So. 2d 1328 (Miss. 1981).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. § 1257(3). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments Six and Fourteen.

STATEMENT OF THE FACTS

In 1973, Petitioner was a shareholder along with several other associates in Memphis

Radio Telephone Company, Inc. (MRT), a corporation that was in the business of constructing and operating mobile radio telephone operations. Petitioner was also at this same time a shareholder with the above associates and others in Communications Media Corporation (CMC); and this corporation was in the business of serving as a distributor of radio and other electric equipment. Batesville Radio Telephone Company, Inc. (BRT) was organized as a domestic Mississippi Corporation with MRT owning one-half (1/2) of its authorized capital stock and three (3) local investors from Batesville, Mississippi, Brasell, Hudson, and Monroe Pointer Management Corporation (Pointer), owning the other one-half (1/2) of its authorized capital stock. These three (3) local investors were mostly in the business of operating mobile equipment and they could profit from the

proposed service and they knew others in the Batesville area who could also benefit from it.

The shareholders of BRT agreed that BRT would purchase its equipment through MRT's affiliated companies. BRT, shortly after organization, employed counsel to secure its application for a Certificate of Convenience and Necessity before the Mississippi Public Service Commission; and it also opened an office in Batesville, Mississippi, and employed a receptionist/bookkeeper. During this period Brasell was President of BRT and Petitioner was the corporate Secretary. Although Petitioner did not devote his full time to BRT, nor was he paid a salary for his services, Petitioner took an active role in BRT and was its moving force.

Subsequently, BRT had two (2) hearings before the Mississippi Public Service Commission on its application for a Certificate of Convenience and Necessity; and after the

first hearing the Commission took no action and asked BRT to return at a later date; and, at its second hearing, the Commission again took no action upon BRT's application.

On February 22, 1974, BRT borrowed $18,720 from the Bank of Batesville (TR. 139-140). The note was secured by the financial statements of Brasell, Hudson and Pointer (TR. 82), and executed on behalf of BRT by Brasell as President and Petitioner as Secretary (TR. 141).

The proceeds of the loan were deposited in BRT's checking account with the Bank of Batesville, and, subsequently, a check was drawn on the BRT account payable to the order of CMC in the sum of $18,720. This BRT check was signed on behalf of BRT by Brasell as President and Petitioner as Secretary. The notation "purchase of equipment" was written on this check. This check was delivered to Petitioner for the purchase of equipment, and

Petitioner, upon receipt of same, opened a local account for CMC with the Bank of Batesville. Petitioner endorsed the BRT check "Communications Media Corp. For Deposit Only", and deposited it in the new CMC account. Subsequently, Petitioner, as an officer of CMC, wrote fourteen (14) checks totaling $17,930.85, and this local CMC account with the Bank of Batesville remained active thereafter for a time with other deposits being made and other checks being written by CMC; and the local CMC account eventually became inactive on June 28, 1974.

By late spring of 1974, the Bank of Batesville asked that BRT put up additional collateral to secure its note. An inventory of equipment then present in BRT's Batesville office was made by Petitioner and assigned a value by him of $18,720. An invoice was supplied by CMC which itemized each piece of equipment inventoried at the BRT office and set

the total value at $18,720, and this document was delivered to the bank.

Since BRT never was granted a Certificate of Convenience and Necessity by the Mississippi Public Service Commission and, therefore, was not able to secure a Federal Communications Commission license to construct and operate a radio common carrier as BRT proposed to do, it failed as a business operation. BRT's loan with the Bank of Batesville was not timely paid, and several renewals were granted by the bank and eventually, in 1976 Brasell, Hudson and Pointer paid off the bank note. When BRT closed its office some parts and equipment of the type itemized on the inventory prepared by BRT for the Bank of Batesville was still on the premises.

Petitioner was indicted for embezzlement and forgery on October 15, 1975, and he was subsequently arrested on September 9, 1976. Initially, William L. Cook was appointed by the

Court as Petitioner's defense attorney, and he was later substituted with the appointment of William Kirksey as his defense attorney.

Petitioner waived arraignment and entered a not guilty plea on October 18, 1976. Petitioner's appointed counsel Kirksey moved for a continuance at this time and one was granted by the Court, and at this same time, the Court set Petitioner's case for trial on April 13, 1977. Subsequently, Kirksey withdrew as Petitioner's attorney and he was substituted by the appointment of Robert Clark and Ben Thomas Cole.

These newly appointed attorneys moved for and were granted a continuance of the trial to the October Term of Court, and on October 12, 1977, trial date was later set. On the scheduled trial date Petitioner's appointed counsels attempted to remove the case to the United States District Court for the Northern District of Mississippi under the provisions of

28 U.S.C. § 1443. On October 17, 1977, the United States District Court remanded the case to the Circuit Court of Panola County. An appeal was immediately taken to the Court of Appeals for the Fifth Circuit, but was later voluntarily dismissed. Petitioner's case was reset for trial on April 17, 1978.

On April 14, 1978, Petitioner retained John B. Farese and John Booth Farese as his defense counsel. The Fareses moved for leave to appear, and Clark and Cole moved for leave to withdraw. On April 17, 1978, the substitution of counsel was allowed, but Clark, Cole, and Petitioner were cited for contempt by the Circuit Judge for delay.

At defense's request the Court ordered a change of venue to Tate County and scheduled the case for trial at the April 1978 Term; however, venue was subsequently returned to Panola County, and a new trial date of October 16, 1978 was set.

On April 9, 1978, Petitioner retained Robert E. Buck of the Greenville Bar as counsel to file a civil action in the United States District Court seeking to enjoin the State criminal proceeding. Later, T. H. Freeland, III, joined Buck as Petitioner's retained counsel in the Federal action. Farese, who had recommended Freeland to Petitioner, did not appear in the Federal action. On October 12, 1978, the United States District Court denied Petitioner's motion to enjoin, and trial began in the Circuit Court of Panola County. Appellant was represented at this trial by John B. Farese, and a mistrial was entered on October 21, 1978 when the jury was unable to agree upon a verdict.

After the mistrial Farese advised Petitioner that he believed that the State would not try Petitioner again, and this statement was made by Farese even after Farese had been told by the Assistant District

Attorney who prosecuted the case that he was going to try Petitioner again. At this same time, Farese informally told Judge Baker, the Circuit Court Judge, and the Assistant District Attorney that he would no longer represent Petitioner. Farese did not file a formal motion to be relieved as counsel at the time, nor did Farese then advise Petitioner of his intentions to withdraw.

On November 1, 1978, Farese wrote to Petitioner stating among other things:

> The primary purpose of this letter is to advise you and Mr. Freeland that I am going to be compelled to withdraw from further participation in this case. As you know, this office has performed all of its obligations relative to our employment. I firmly believe that the result of the hung jury should make any further prosecution unlikely.

Freeland received a copy of this letter which was captioned "Smith vs. Mississippi, DC78-1-WK-O." Petitioner had never consulted Freeland about representing him in the criminal

case, and Freeland did not know the purpose of Farese's November 1 letter. However, after receiving his copy, Freeland telephone Petitioner and told him that he ". . .had better get straight," and further advised Petitioner that he would not represent him on short notice. Freeland testified that he heard nothing further concerning possible representation of Petitioner and, therefore, assumed that ". . .things were okay" until he received a telephone call from Petitioner on the first day of his second trial in Panola County.

On November 7, 1978, Petitioner wrote to Farese expressing uncertainty as to the meaning of the third paragraph of Farese's November 1 letter, indicating his belief that Farese's desire to withdraw was prompted by financial considerations, and that Farese had undertaken to represent Petitioner in three (3) trials for the fee already paid him.

Farese again wrote to Petitioner on November 16, 1978. In that letter Farese denied the existence of any agreement to represent Petitioner in all three (3) of the Panola County indictments for the same fee, and stated "I am sending this letter at this time so that you can make arrangements for other counsel to represent you." He enclosed with that letter a copy of a letter written to Freeland on the same date advising him of the estimated cost of a transcript of the first trial at Batesville, Mississippi. This was in response to a letter dated November 7, 1978, of which Farese received a copy, from Freeland to Petitioner discussing the possibility of a return to federal court and estimating the cost of a transcript of the Panola County trial.

On March 2, 1979, Judge Baker wrote to Petitioner, with a copy to Farese, advising him that his embezzlement case was set for trial on Thursday, April 12, 1979, as a backup case, and

further, stating that Petitioner should be fully prepared to go to trial on that date, even though there was then one other case which had the prime setting. Judge Baker testified that he was then not sure Farese was out of the lawsuit, even though he thought he was, and sent him a copy of the letter for that reason.

On March 6, 1979, Farese wrote to Petitioner, with a copy to Judge Baker, reiterating his withdrawal as Petitioner's attorney.

Petitioner wrote to Farese on April 2, 1979, acknowledging receipt of Judge Baker's letter of March 2, and Farese's letter of March 6. Petitioner noted that he had been away from Memphis for an unstated period of time and expressed shock at Farese's expectation that he would have obtained other counsel to represent him. Petitioner told Farese in that letter that because of his financial circumstances he was unable to employ other counsel, even if he

wanted to. In the final paragraph Petitioner discussed several pretrial matters he felt required attention, and requested Farese's further advice. A copy of that letter was sent to Judge Baker. In addition, Terrance B. Miller, President of Memphis Mobile Telephone Company, Inc., who arranged for the money with which to retain Farese, wrote to Farese on March 31, 1979, referring to Farese's letter of March 6 to Petitioner discussing his (Miller's) understanding of the original financial arrangements with the Farese firm, pointing out Petitioner's poor financial condition and requesting an appointment with Farese ". . .to come and counsel with you further, prior to the April 12th setting in Batesville." Copies of Miller's letter were sent to Petitioner, as well as to Odie Graves, another stockholder in MRT.

On April 4, 1979, Farese wrote to both Miller and Petitioner. In his letter to

Miller, Farese referred to a telephone conversation which took place that day between Farese, Miller, and Petitioner. Farese insisted that he had performed all of his obligations to Petitioner and had performed all services for which he had been paid. In his April 4 letter to Petitioner, Farese summarized their previous correspondence, insisted that he had performed all services for which he had been retained, and stated that his disinclination to represent Petitioner further was not a matter of fee, but a question of time. He concluded by saying: "So that there will be no further question, I cannot and will not represent you in these pending matters any further."

On April 7, 1979, Miller wrote a lengthy reply to Farese's April 4 letters. He informed Farese that since Farese's November 1, 1978 letter was captioned "U.S. District Court,

DC78-1-WK-O," he and Petitioner assumed that it pertained only to that case, and not to the state criminal prosecutions. He then embarked upon a detailed recapitulation of the history of the litigation and Petitioner's relationship with Farese. Farese did not reply to that letter.

Judge Baker wrote to Petitioner on April 9, 1979, advising him that the primary case set for April 12 had been rescheduled, and that Petitioner's case was now the primary case, trial of which would begin at 9:00 A.M. on Thursday, April 12, 1979. Judge Baker did not send a copy of that letter to Farese, and testified that this was because he knew Farese was no longer in the case. Judge Baker further testified that he realized no order had been entered to that effect, but considered this a "mere formality."

Petitioner wrote to Judge Baker on April 10, 1979, acknowledging receipt of the April 9

letter and advising the Court of his situation with Farese. He took the position that, until receiving Farese's letters on "March 1" (actually March 6) and April 4, 1979, he was not aware that Farese would not represent him further in the criminal proceedings, and stated that, although he did receive Farese's November 1, 1978 letter, he believed it referred only to the federal civil action No. DC78-1-WK-O. Petitioner made no mention of Farese's letter of November 16, 1978, nor his letter to Farese of November 7, 1978, nor his telephone conversation with Freeland prompted by Farese's November 1, 1978 letter. Petitioner expressed the belief that he had lived up to all of his obligations to the Court.

Petitioner made no effort to obtain another attorney until April 12, 1979, the first day of his second trial.

On April 12, 1979, Petitioner, accompanied by Terrance B. Miller, appeared at the

Batesville Courthouse. Petitioner filed with the Court a motion for continuance signed by Petitioner, pro se. The motion was denied by the Court.

During the morning of April 12, Farese arrived at the Batesville Courthouse; he stated that he was on his way from Sardis, Mississippi, and stopped by to see what was going on. Farese conferred with Judge Baker out of Petitioner's presence and during that time move ore tenus to be relieved in all three (3) of the cases pending against Petitioner. Farese's motion was sustained and a written order was entered relieving him as counsel.

When Petitioner's motion for continuance was denied, he called Freeland that morning for assistance in selecting the jury, and Freeland, unable to help, suggested Edwin Roberts, whom Petitioner contacted approximately at noon on April 12. Petitioner went to trial on the morning of April 12 without counsel and

conducted voir dire of the jury and selected the jury in his case.

At the noon recess Petitioner first met with Roberts and retained his services. Roberts had been in the general practice of law for six (6) or seven (7) years. He had had an average of two (2) criminal cases a year, and he had never tried an embezzlement or other white collar case. Roberts' only knowledge of the law of embezzlement was retained from his law school days.

Prior to his employment on April 12, Roberts had never met Petitioner and knew nothing of his case.

When the Court reconvened after the noon recess, Roberts entered his appearance and was introduced to the jury. Roberts moved for a continuance of the case on the grounds that he had just been retained by Petitioner and that he was totally unprepared to provide an

adequate defense to the Petitioner. The Court denied Roberts' motion for continuance.

Petitioner was convicted on April 17, 1979, and sentenced to a fine of $1,000.00 and costs and to serve a sentence of eight (8) years with the Mississippi Department of Corrections.

REASONS FOR DENYING THE WRIT

Petitioner has presented no federal question of sufficient substance that would warrant the granting of this petition for writ of certiorari.

ARGUMENT

1. THE COURT SHOULD DENY THE WRIT BECAUSE PETITIONER'S LACK OF EFFECTIVE ASSISTANCE OF COUNSEL WAS CAUSED BY HIS OWN LACK OF DILIGENCE

Respondents agree that an accused is not only entitled to be represented by counsel, but

is entitled under the Sixth Amendment to the United States Constitution to the effective assistance of that counsel. Washington v. Strickland, ___U.S.___, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). However, in the instant case, Petitioner was not denied his right to the assistance of counsel or to the effective assistance of counsel, but caused it. Petitioner's actions (or lack of action) justified the trial court in denying Petitioner's motion for continuance and requiring him to proceed to trial initially without counsel. This Court has held that because of the wide latitude that must be accorded trial judges in scheduling trials, broad discretion must be granted them on continuances; "[O]nly an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." Morris v. Slappy, 461 U.S. 103 S.

Ct. 1610, 1616, 75 L. Ed. 2d 610, 620 (1983), citing Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (1964). Here it was clear from Petitioner's history of delays that his attempts to get a continuance on the day of the trial were "not made in good faith, but were a transparent ploy for delay." Morris v. Slappy, 103 S. Ct. at 1617, 75 L. Ed. 2d at 621. As the Fifth Circuit held in U.S. v. Fowler, 605 F. 2d 181, 183 (5th Cir. 1979), "The right to assistance of counsel . . .may not be put to service as a means of delaying or trifling with the Court."

The cases cited by Petitioner in his brief do not speak to a situation where the accused's failure to have effective counsel was caused by the accused's lack of diligence. Therefore, they are not controlling. This Court has amply spoken to the matter and, therefore, should deny the writ of certiorari.

II. THE DECISION BELOW WAS A SIMPLE APPLICATION OF THIS COURT'S DECISION IN JACKSON v. VIRGINIA

Certainly, Petitioner is not entitled to a grant of certiorari on this issue. This Court has amply decided what courts must look for when a state prisoner attacks the sufficiency of evidence in a federal habeas corpus action. In Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), reh. den., 444 U.S. 890 (1979), this Court held that when a state prisoner seeking federal habeas corpus relief attacks the sufficiency of the evidence upon which he was convicted, the constitutional standard to be applied by the federal habeas court is whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. 443 U.S. at 324. Therefore, the law in this area is clear.

Further, the issue here is of no importance beyond the immediate parties, since the issue has been firmly decided. This Court

has repeatedly held that the writ of certiorari is not to be granted in cases the settlement of which is important only to the parties as distinguished from the public. Rice v. Sioux City Cemetery, 349 U.S. 70, 79 and n. 2 (1955) (citing cases in which writs of certiorari were dismissed as improvidently granted because "it became manifest that the question was of importance merely to the litigants and did not present an issue of immediate public significance"); Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923) (Writ of Certiorari should be granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties). Therefore, since the law in this area has been firmly decided and since a grant of certiorari will only benefit that of the parties, certiorari must be denied.

The sufficiency of the evidence in this action has been reviewed by the Mississippi Supreme Court, the United States Magistrate, the District Court, and the United States Court of Appeals for the Fifth Circuit, and each court found that the evidence was sufficient to justify the finding of Petitioner guilty beyond a reasonable doubt. It can best be summed up as the District Court found:

> There is sufficient evidence from which the jury could have rationally inferred that the use of the CMC name on the bank account, which was opened by petitioner and upon which only he could draw checks, was merely a facade or instrument by which petitioner accomplished his objective of obtaining funds from BRT for the use of MRT. One may not shield himself from prosecution for embezzlement of the property of a third person through the use of corporate instrumentality which he dominates and controls. (Report and Recommendation of U.S. Magistrate, p. 82).

The District Court also found:

> There was still ample evidence from which a rational jury could

> have found beyond a reasonable doubt that the BRT check was delivered to petitioner, not to pay for such merchandise, but to make a downpayment on an automatic answering terminal. This being so, in applying the funds to a different end, even though ostensibly for the benefit of BRT, petitioner, by directing the disposition of the funds, applied them to his own use, and this constituted a conversion under Mississippi Law. Boteler v. State, 363 So. 2d 279, 282-283 (Miss. 1978).

As a matter of Mississippi Law (§ 97-23-19, Miss. Code Ann. of 1972), Petitioner was proven beyond a reasonable doubt that he was guilty of embezzlement. The four elements of embezzlement (see Petitioner's brief, p. 12) were all proven beyond a reasonable doubt. Therefore, the decision of the Court below was correct and certiorari should not be granted.

CONCLUSION

The Petitioner's contentions pose no question of particular moment or indecision in the case law of the land, and it is, therefore, respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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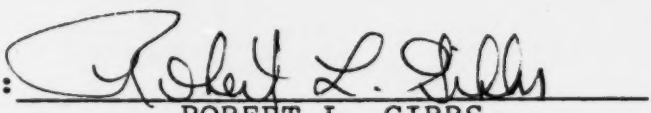
BY: 
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CERTIFICATE OF SERVICE

I, Robert L. Gibbs, an Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing **Brief in Opposition** to the following:

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This, the 4th day of October, 1985.

ROBERT L. GIBBS